

1992

# State of Utah v. Fernando Ruesga : Reply Brief

Utah Court of Appeals

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Jan Graham; Attorney General; Attorney for Appellee.

Rober K. Scowcroft; Elizabeth Holbrook; Salt Lake Legal Defender Association; Attorneys for Appellant.

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UTAH  
JUDICIAL  
COURT

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DOCKET NO. 920426 IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
FERNANDO RUESGA,	:	Case No. 920426-CA
Defendant/Appellant.	:	Priority No. 2

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**REPLY BRIEF OF APPELLANT**

This is an appeal from an order revoking probation and the imposition of a previously suspended prison sentence for unlawful possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. section 58-37-8(2)(a)(i), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, Judge, presiding.

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JAN 21 1993  
COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
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**TEXT OF CONSTITUTIONAL PROVISIONS**

Article I, Section 7 of the Constitution of Utah provides:

**Sec. 7. [Due process of law.]**

No person shall be deprived of life,  
liberty or property, without due process of law.

Amendment XIV to the Constitution of the United States provides in pertinent part:

**Section 1.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
FERNANDO RUESGA,	:	Case No. 920426-CA
Defendant/Appellant.	:	Priority No. 2

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SUMMARY OF ARGUMENT

Mr. Ruesga's refusal to sign the agreement presented by Agent Shavers was the basis of the revocation of his probation. The State does not contest the fact that signing the probation agreement was not a condition of probation at the time that Mr. Ruesga refused to sign the agreement when it was presented to him by Agent Shavers. The probation revocation violated Mr. Ruesga's right to due process of law.

The State's repeated contentions that Mr. Ruesga subsequently refused to sign the agreement, or tried to condition his signing the agreement on the trial court's dismissal of the order to show cause, are based on a mistaken reading of the record. There is no support for the State's reading of the record, or for the trial court's oral finding that Mr. Ruesga argued with the trial court about signing the probation agreement.

ARGUMENT

The State argues in point I of its brief that "the trial

court properly found that defendant had wilfully violated his probation by refusing to sign the probation agreement and, therefore, did not abuse its discretion in revoking defendant's probation." Brief of respondent at 10-18. In this point, the State argues as though there were no legal questions involved, consolidating the issues as follows:

Defendant attacks the trial court's finding of a wilful violation in multiple ways: (1) he asserts that signing the probation agreement was not a term of probation (Br. of Appellant, Points I and II); (2) he argues that any violation was not wilful due to his failure to understand that signing the agreement was a condition of probation (Br. of App., Point II); and (3) he challenges the fifth finding of fact wherein the trial court found that defendant's failure to sign the agreement was a violation of probation (Br. of App., Point III). The gist of these claims is the same: there is no factual basis for the probation revocation. Thus, defendant's multiple arguments may be considered as a single inclusive issue: Is the finding of a wilful violation clearly erroneous such that the trial court abused its discretion in revoking defendant's probation? State v. Archuleta, 812 P.2d 80, 82 (Utah App. 1991); State v. Martinez, 811 P.2d 205, 209 (Utah App. 1991).

Brief of respondent at 10.

The State's argument omits the key legal issue: did the trial court violate due process of law by revoking probation on the basis of a condition of probation that was not articulated until after the purported violation? See opening brief of appellant, points I and II.

The State's argues that this Court should not reach the merits because appellate counsel did not marshal the evidence in support of the trial court's ruling. Brief of respondent at 13-14.



This argument again overlooks the legal error of the trial court in violating Mr. Ruesga's right to due process of law by revoking his probation on the basis of a condition of probation that was articulated after the purported violation. Under Utah law, one need not marshal the evidence when the trial court's findings are legally deficient, as they are in this case. Woodward v. Fazzio, 823 P.2d 474, 477-478 (Utah App. 1991). One may demonstrate that a finding is clearly erroneous by demonstrating that it was induced by an erroneous view of the law. State v. Jackson, 805 P.2d 765, 766 (Utah App.), cert. denied, 815 P.2d 241 (Utah 1991). The trial court's findings in the instant case were clearly erroneous because they were made without incorporating the law establishing that due process prohibits trial courts from revoking probation on the basis of conduct preceding the articulation of the condition of probation that was purportedly violated. E.g. Douglas v. Buder, 412 U.S. 430 (1973) (per curiam).

Assuming arguendo that the marshalling requirement applies, counsel for Mr. Ruesga has satisfied it to the extent possible, given the legal errors underlying the findings. If this Court compares the appellant's opening brief with the respondents' brief, the Court will see that counsel for Mr. Ruesga has discussed all of the evidence relied on by the State. Compare brief of appellant at 2-4, 7-15, and 18-24, with respondent's brief at 2-8, 14-18.

While the State's version of events differs from Mr. Ruesga's, the discrepancies stem from the State's mistaken reading of the record. The State argues that Mr. Ruesga testified that he

understood his obligation of probation, and that when Agent Shavers presented the conditions of probation, Mr. Ruesga declined probation, opting to serve a jail sentence. Brief of respondent at 14. If this Court reviews the transcript pages to which the State cites in making this argument, this Court will see that Mr. Ruesga testified that when Agent Shavers presented the probation agreement, Mr. Ruesga did not understand that the agreement encompassed his obligations, but had since learned of his obligations and was willing to comply with them (R. 119-122 (T.4 11-14)). A copy of the full transcript is in appendix 1 to this brief.

The State repeatedly contends that Mr. Ruesga refused to sign the probation agreement after the dispute with Agent Shavers, trying to condition his signing of the probation agreement on the trial court's dismissal of the order to show cause. Respondent's brief at 6, 7, 9, 15. If this Court reviews the transcript pages to which the State cites in making these allegations, this Court will see that the State's perceptions are in error. At the first hearing on the order to show cause, the trial court continued the matter for two weeks because trial counsel was facing a family emergency (R. 87-88 (T.2 3-4)). At every subsequent hearing, Mr. Ruesga was willing to sign the probation agreement (R. 102, 119, 141 (T.3 3, T.4 11, T.5 5)). While trial counsel for Mr. Ruesga correctly instructed Mr. Ruesga not to admit to a probation violation (T.2 3; R. 87), and while trial counsel correctly asked the court to strike the order to show cause (T.3 3; R. 162), no one ever told the court that Mr. Ruesga's willingness to sign the probation agreement was

conditioned on the trial court's dismissing the order to show cause. See appendix 1. The trial court's finding that Mr. Ruesga argued with the trial court about signing the probation agreement is likewise devoid of record support. See appellant's brief at 23-24.

The State contends, "During the revocation hearing, defendant stated that the court had never allowed him to speak during the sentencing hearing (R. 119)." Mr. Ruesga made no such statement (R. 119).

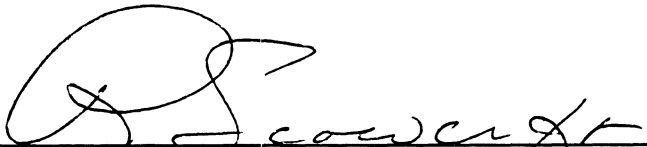
The State's discussion of the record concerning Mr. Ruesga's ability to understand the English language is essentially accurate. However, this Court should note that the trial court appointed an interpreter for Mr. Ruesga at the October 23, 1992 hearing on the remanded issues surrounding the certificate of probable cause. Minute entry of October 23, 1992, in district court pleadings file, without record stamp. This hopefully demonstrates that the trial court now recognizes Mr. Ruesga's need and right to understand all court proceedings.

The State never contests the fact that signing the probation agreement was not a condition of probation at the time of Mr. Ruesga's refusal to sign the agreement when it was presented to him by Agent Shavers. Yet it was Mr. Ruesga's refusal to sign the probation agreement when Agent Shavers presented it that was the basis of the trial court's revocation of probation (R. 60). The trial court's discretion to revoke probation in no way minimizes this violation of due process of law.


CONCLUSION

This Court should reverse the trial court's order revoking Mr. Ruesga's probation.

Respectfully submitted this 13 day of January, 1993.



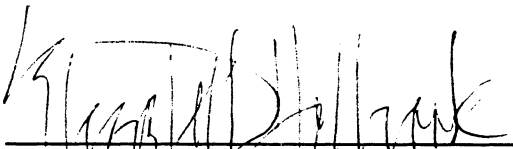
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Attorney for Mr. Ruesga



ELIZABETH HOLBROOK  
Attorney for Mr. Ruesga

CERTIFICATE OF DELIVERY

I, Elizabeth Holbrook, hereby certify that I have caused to be served eight copies of the foregoing to the Utah Court of Appeals and two copies of the foregoing to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 13 day of January, 1993.



ELIZABETH HOLBROOK

DELIVERED this \_\_\_\_ day of January, 1993.

APPENDIX 1  
Copy of all transcripts

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IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

\* \* \*

THE STATE OF UTAH	)	
	)	Case Nol 911901842
Plaintiff,	)	
	)	Judge Timothy R. Hanson
vs.	)	
	)	
FERNANDO RUESGA,	)	
	)	
Defendant.	)	
_____	)	

BE IT REMEMBERED that the above-entitled case came on regularly for hearing before the Honorable Timothy R. Hanson, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake City, Salt Lake County, State of Utah on the 6th day of April, 1992, at 9:00 a.m., and that the following proceedings were had.

\* \* \*

**FILED DISTRICT COURT**  
Third Judicial District

**JUL 27 1992**

ORIGINAL

SALT LAKE COUNTY  
By Wm. S. Hoff  
Deputy Clerk

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BUNNY C. NEUENSCHWANDER, CSR, RPR

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A P P E A R A N C E S

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P R O C E E D I N G S

April 6, 1992

MR. SCOWCROFT: Your Honor, I also have  
number eighteen, State versus Ruesga.

THE COURT: Let's take that. Mr. Ruesga is  
present. State of Utah versus Fernando Ruesga,  
911901842. You are Fernando Ruesga?

MR. RUESGA: Yes, Your Honor.

THE COURT: The record will show the  
defendant is present. This matter is on the court's  
calendar for sentencing. On a prior occasion, Mr. Ruesga  
plead guilty to the crime of possession of a controlled  
substance, a third degree felony. Presentence report was  
originally prepared, and primarily because of some  
difficulties with not knowing what occurred on prior  
criminal charges, I asked that it be updated, and also  
that the matrix, any deviations from the matrix be  
explained. I've now received an updated presentence  
report, and I think you've seen that, Mr. Scowcroft.

MR. SCOWCROFT: I have, Your Honor.

THE COURT: Ready to proceed?

MR. SCOWCROFT: I am

THE COURT: Glad to hear from you.

MR. SCOWCROFT: Your Honor, I also obtained  
existing records from courts in Salt Lake County. I



1       contacted all the justice courts in the county, including  
2       South Salt Lake where Justice of the Peace Searle sits,  
3       Third Circuit Court, and the District Court, records  
4       existing indicate that Mr. Ruesga has been convicted for  
5       three prior misdemeanors, and does have a pending DUI now  
6       before Judge Jones. The charges he's been convicted for  
7       were 1990, retail theft, intoxication in or about a  
8       vehicle, and resisting arrest. That was in November of  
9       '90, and September of '90, and alcohol related reckless  
10      in August of 1991, taillight, and no driver's license.  
11      There are no other records indicating he's ever been  
12      convicted for any other offense.

13             In the presentence report, the amended presentence  
14      report, we have here, that is -- that representation born  
15      out by the disposition statements, file destroyed, file  
16      destroyed, et cetera. I don't know if those files were  
17      destroyed, but there are no records indicating that he's  
18      ever been convicted of those offenses.

19             THE COURT: What does your client say? Has he,  
20      or has he not?

21             MR. SCOWCROFT: I don't think he has, Your  
22      Honor. There is simply no records.

23             THE COURT: All we've got to do is ask him.

24             MR. SCOWCROFT: But anyway, he's also never  
25      been charged with the exception of the present case, and

1 the case in 1989 that was dismissed. Here it's not  
2 listed, possession of cocaine. Those are his only felony  
3 charges. This is his only felony conviction in his life.  
4 He's thirty-seven years old. The new presentence report  
5 gives him a score of three on the matrix based on six  
6 misdemeanor convictions. That puts him in the excellent  
7 category. My investigation suggests he ought to have a  
8 score of two, which also puts him in the excellent  
9 category. I do not believe that the aggravating  
10 circumstances here, as stated, long criminal record, I  
11 don't think that's relatively speaking true, at least not  
12 to the degree that it would justify an upward deviation  
13 from the statutory recommendation, and subsequent DUI  
14 which occurred about a month -- he was stopped about a  
15 month after this house search occurred. I don't think  
16 those things justify sending him to prison in this case.  
17 I think he may need some substance abuse counseling,  
18 particularly with alcohol, which seems to be his real  
19 problem. But I do not believe, as I said, that those  
20 allegations justify deviating in that matter from the  
21 matrix.

22 In terms of the facts of the case again, 1.3 grams  
23 of cocaine were found pursuant to a warrant search at a  
24 house. He said they were his. It was his son's house  
25 who also has the same name. In the house, hidden in a

1 speaker, there was a gun, not his house. They also found  
2 1.5 grams of marijuana in another room. It's not the  
3 room he was staying. Those were not his. There's no  
4 allegation he's dealing drugs here. It was a small  
5 amount of drugs he had for his own personal use. That's  
6 against the law. They are a serious crime, but it's not  
7 -- those aggravating factors I don't think ought to be  
8 attributed to him, because it was not his house, and of  
9 course he was not charged with possessing marijuana. The  
10 gun was not attributed to him, and he was not charged  
11 with possession with intent to sell.

12 So I would simply ask the Court to give him an  
13 opportunity to demonstrate to the Court that he can  
14 follow through on probation, and at least give him that  
15 one chance.

16 THE COURT: All right. Mr. Ruesga, is there  
17 anything you want to say besides what your attorney has  
18 had to say regarding sentencing in this matter?

19 MR. RUESGA: All I have to say, I do  
20 appreciate being a resident, because it helped me stay  
21 out of anything. I ain't smoking, I ain't drinking, I  
22 ain't doing anything at all. I can prove to you I can go  
23 along with any kind of a program you want to give me,  
24 whatever. I do need a chance, though, to prove to you --  
25 I can prove to myself, but that's not enough, to prove to

1       you all that I have changed.

2               THE COURT:       What's happened with the latest  
3       DUI charge?

4               MR. SCOWCROFT:       It's pending. It is before  
5       Judge Jones.

6               THE COURT:       Thank you. What say the State?

7               MR. HORNAK:       Your Honor, I don't have the  
8       presentence report, or any notes in the file, so the  
9       State would submit it upon the recommendations in the  
10       presentence report.

11              THE COURT:       The record ought to show Mr.  
12       Behrens from the County Attorney's Office said the  
13       recommendation is prison, at least that's what he said in  
14       the presentence report. Anything further?

15              MR. SCOWCROFT:       He spent twenty-one days in  
16       jail. He may have been held on another case. I don't  
17       have that information to provide the court, but I could  
18       provide it. I think he did spend some time in jail when  
19       he was arrested when the house was searched.

20              THE COURT:       All right. Is there any legal  
21       reason I ought not to impose sentence at this time?

22              MR. SCOWCROFT:       I know of none.

23              THE COURT:       Ms. Hornak?

24              MR. HORNAK:       No, Your Honor.

25              THE COURT:       Mr. Ruesga, having applied guilty

1 to the crime of possession of a controlled substance, a  
2 third degree felony, it's the judgment of this Court that  
3 you be committed to the Utah State Prison for the  
4 judgment, that's the indeterminate term which may be for  
5 as long as five years, and I also impose the maximum fine  
6 of \$5,000. Mr. Ruesga, as I review this, while most of  
7 these records have been destroyed, I don't know what's  
8 happened, I don't make any decision one way or another in  
9 that regard, but I think that shows to me that there  
10 isn't sufficient justification for deviating from the  
11 guidelines in this case, nor am I otherwise impressed  
12 that the guidelines ought to be deviated from. I have no  
13 indication whether these prior charges were convictions,  
14 whether they ever occurred. And if the file has been  
15 destroyed, that's unfortunate, but it has. Accordingly,  
16 I do believe that you're an appropriate candidate for  
17 probation. Accordingly, I'm going to deviate from the  
18 recommendation of Adult Probation and Parole, because I  
19 can see no legal basis as to why they should deviate from  
20 the guidelines.

21 I am going to place you on probation for a period of  
22 eighteen months, supervised by Adult Probation and Parole  
23 under the following terms and conditions. I'll suspend  
24 all but \$1,500 of the fine. Added to that is the  
25 twenty-five percent surcharge. The Court is satisfied

1       that terms and conditions ought to include the usual drug  
2       and alcohol conditions.  You're not to use controlled  
3       substances, you're not to have paraphernalia in your  
4       possession, you're not to associate with people who use  
5       controlled substances, and you are not to have any  
6       prescriptions, or -- from a medical Doctor, without your  
7       probation officer knowing about it.

8               As far as alcohol, you're not to use alcohol during  
9       the period of time that you're on probation.  You are to  
10      enter into, and successfully complete any drug or alcohol  
11      programs Adult Probation and Parole thinks is  
12      appropriate.  Not to, like I say, use alcohol.  You're  
13      not to frequent bars during the period of time that  
14      you're on probation.  I want you working full-time, and I  
15      want you to establish a permanent address.

16             The sanction in this, Mr. Ruesga, will be that you  
17      serve six months in the county jail.  I'll give you  
18      credit for the twenty-one days that you've already  
19      served.  Commitment is forthwith.  Take him into custody.

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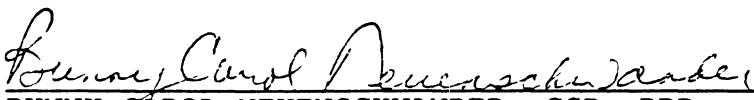
REPORTER'S CERTIFICATE

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

I, BUNNY CAROL NEUENSCHWANDER, do hereby  
certify:

That I am a Certified Shorthand Reporter,  
License No. 152, and one of the official court reporters  
of the State of Utah; that on the 6th day of April, 1992,  
I attended the within matter and reported in shorthand  
the proceedings had thereat; that later I caused my said  
shorthand notes to be transcribed into typewriting, and  
the foregoing pages, numbered from 3 to 9, inclusive,  
constitute a full, true and correct account of the same  
to the best of my ability.

Dated at Salt Lake City, Utah, this 26th day of  
July, 1992.

  
BUNNY CAROL NEUENSCHWANDER, CSR, RPR

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IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

\* \* \*

THE STATE OF UTAH,	)	
	)	Case No. 911901842
Plaintiff,	)	
	)	Judge Timothy R. Hanson
vs.	)	
	)	
FERNANDO RUESGA,	)	
	)	
Defendant.	)	
_____	)	

BE IT REMEMBERED that the above-entitled case came on regularly for hearing before the Honorable Timothy R. Hanson, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake City, Salt Lake County, State of Utah on the 4th day of May, 1992, at 9:00 a.m., and that the following proceedings were had.

\* \* \*

FILED DISTRICT COURT  
Third Judicial District

JUL 27 1992

ORIGINAL

BUNNY C. NEUENSCHWANDER, CSR, ~~FILED~~

SALT LAKE COUNTY  
By MA S. R.  
Deputy Clerk 1  
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A P P E A R A N C E S

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1 P R O C E E D I N G S

2 May 4, 1992

3 MR. SCOWCROFT: Number thirteen, State v.  
4 Ruesga. Mr. Ruesga is present. Roger Scowcroft on his  
5 behalf.

6 THE COURT: You are Fernando Ruesga?

7 MR. RUESGA: Yes, Your Honor.

8 THE COURT: This is State of Utah versus  
9 Fernando Ruesga, 911901842. It's on the court's calendar  
10 for an order to show cause suggesting that the defendant  
11 violated the terms and conditions of his probation. Mr.  
12 Ruesga, have you seen the order to show cause, and the  
13 affidavit in support of the order to show cause?

14 MR. RUESGA: I don't understand it, Your  
15 Honor. Yes, I have seen it.

16 MR. SCOWCROFT: I've seen it, as well, Your  
17 Honor.

18 THE COURT: I suppose we can screw around  
19 with this, or Mr. Ruesga can sign his probation  
20 agreement. What do you want to do?

21 MR. SCOWCROFT: I advised him to deny the  
22 allegations today. I ask that this be set for deposition  
23 in two weeks. I just got this affidavit. I need an  
24 opportunity to contact the probation department, contact  
25 the county attorney on this matter, and work these things

1 out. Also, I need to -- there's been an emergency in my  
2 family. I have to leave the State right away.

3 THE COURT: I understand that. That's fine.  
4 You can work whatever you want out. If Mr. Ruesga  
5 doesn't sign the probation agreement, he's going to  
6 prison. Simple as that. Two weeks.

7 MR. SCOWCROFT: That would be just great.

8 THE COURT: 18th, nine o'clock. In the mean  
9 time, Mr. Ruesga will remain in the county jail.

10 MR. SCOWCROFT: That's a disposition.

11 THE COURT: I'll enter a denial on the  
12 affidavit as to the allegation that he failed to sign the  
13 probation agreement.

14 MR. SCOWCROFT: Thanks very much. That's all  
15 I have if I may be excused.

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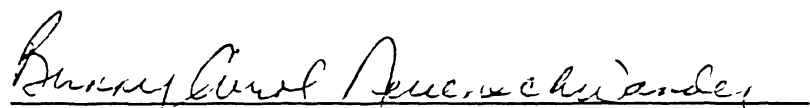
REPORTER'S CERTIFICATE

STATE OF UTAH                    )  
  )       ss.  
COUNTY OF SALT LAKE        )

I, BUNNY CAROL NEUENSCHWANDER, do hereby  
certify:

That I am a Certified Shorthand Reporter,  
License No. 152, and one of the official court reporters  
of the State of Utah; that on the 4th day of May, 1992, I  
attended the within matter and reported in shorthand the  
proceedings had thereat; that later I caused my said  
shorthand notes to be transcribed into typewriting, and  
the foregoing pages, numbered from 3 to 4, inclusive,  
constitute a full, true and correct account of the same  
to the best of my ability.

Dated at Salt Lake City, Utah, this 26th day of  
July, 1992.

  
BUNNY CAROL NEUENSCHWANDER, CSR, RPR

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IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

\* \* \*

THE STATE OF UTAH,	)	
	)	Case No. 911901842
Plaintiff,	)	
	)	Judge Timothy R. Hanson
vs.	)	
	)	
FERNANDO RUESGA,	)	
	)	
Defendant.	)	
_____	)	

BE IT REMEMBERED that the above-entitled case came on regularly for hearing before the Honorable Timothy R. Hanson, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake City, Salt Lake County, State of Utah on the 18th day of May, 1992, at 9:00 a.m., and that the following proceedings were had.

\* \* \*

FILED DISTRICT COURT  
Third Judicial District

JUL 27 1992

ORIGINAL

SALT LAKE COUNTY

By                     

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BUNNY C. NEUENSCHWANDER, CSR, RPR

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A P P E A R A N C E S

FOR THE PLAINTIFF:

Gregory Bown  
Deputy County Attorney  
231 East 400 South  
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Salt Lake City, Utah 84111

FOR THE DEFENDANT:

Roger K. Scowcroft  
SALT LAKE LEGAL DEFENDER  
ASSOCIATION  
424 East 500 South  
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Salt Lake City, Utah 84111

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P R O C E E D I N G S

May 18, 1992

MR. SCOWCROFT: Your Honor, I have also  
number nine, State versus Fernando Ruesga.

THE COURT: State of Utah versus Fernando  
Ruesga 911901842. You are Fernando Ruesga?

MR. RUESGA: Yes, Your Honor.

THE COURT: The record will show the  
defendant is present. This is on the court's calendar  
for an order to show cause as well. It was on before,  
last week, I believe. At that point in time I entered a  
denial of the allegation that the defendant refused to  
sign his probation agreement, and continued the matter to  
today at the defendant's request. Mr. Scowcroft?

MR. SCOWCROFT: Your Honor, Mr. Ruesga does  
not -- will not refuse to sign the probation agreement,  
and for that reason I would ask the court to simply  
strike this order to show cause. He is prepared to --

MR. BOWN: I think what we wanted, Your  
Honor, if he's willing to sign it, we would like to sign  
it in open court.

THE COURT: I want to know why it hasn't been  
signed up to this point in time. If Mr. Ruesga is going  
to jerk me around, I'll jerk him around. Why did I put  
him on probation in the first place? What's the State's

1 position?

2 MR. BOWN: Your Honor, talking with Ms.  
3 Shavers, our concern is the defendant has refused to sign  
4 the probation agreement for some time. There was more to  
5 it than that in terms of I'm not going to sign it. I'm  
6 going to Mexico. We're concerned today, even if he does  
7 sign the probation agreement, that he's signing it in  
8 order to get out of jail to go to Mexico. And I think  
9 this court needs to be convinced that its prior order of  
10 probation is still appropriate, that -- and I think we  
11 also need to be convinced that he's -- if he does sign  
12 the agreement, that he's willing to abide by its terms,  
13 stay around and do what he has to do in order to satisfy  
14 this court's requirement.

15 MR. SCOWCROFT: If I could address that. The  
16 reason he wanted to go to Mexico, because his mother and  
17 father are there, and they are elderly, and they are ill.  
18 During the pendency of this case, with the consent, and  
19 permission of Pre-trial Services, and the Court with  
20 jurisdiction at that time, it might have been the Circuit  
21 Court, Mr. Ruesga did go to Mexico, and he came back.  
22 And he knows full well that having been convicted for a  
23 felony that he cannot run from this court, and that is  
24 not his intention. His intention is to pay his fine, to  
25 complete probation successfully, and then go to Mexico to



1       see his parents before they die. That's all that means.  
2       I think he fully understands what his obligations, and  
3       his situation is here.

4               THE COURT:       Tell me why he hasn't signed the  
5       probation agreement.

6               MR. SCOWCROFT:    He will sign it.

7               THE COURT:       Why hasn't he signed it?

8               MR. SCOWCROFT:    I think he just didn't  
9       understand his obligation. He's fully prepared to sign  
10      it, and he's fully prepared to fulfill his obligations to  
11      this court through probation. Ginger Fletcher from  
12      Pre-trial Services said he was an excellent participant  
13      in Pre-trial Services program, which is a form of  
14      probation in a sense, at least a form of supervision  
15      that's similar to probation in some ways. So I'd just  
16      ask the Court to allow him to do that, and I don't think  
17      he'll let anybody down in that regard.

18              THE COURT:       Is he willing to sign it today?

19              MR. SCOWCROFT:    Yes, he is.

20              THE COURT:       Do I understand that he wants to  
21      admit the allegation?

22              MR. SCOWCROFT:    Well, Your Honor, I don't  
23      think -- I'm advising him not to, because he is fully  
24      prepared to sign the probation agreement, and I don't --  
25      I would not like him to have his probation violated for

1       that reason. Like anyone else in jail, he doesn't like  
2       being in jail. He was upset when that happened. And so  
3       I think based upon his willingness to sign the agreement,  
4       I think the court ought to simply dismiss this order to  
5       show cause based on the nature of the allegation, and his  
6       willingness to -- his prior stated willingness to perform  
7       probation, and his willingness today.

8               THE COURT:     Well, if I was looking at going  
9       to prison for five years, I'd have signed that thing as  
10      soon as someone showed it to me. What's the State's  
11      position? Do you want to dismiss it? If he runs after  
12      --

13             MS. SHAVERS:     Yes. I guess we can't totally  
14      control his behavior, and that's one of the reasons he's  
15      in jail. If he's willing to sign, we'll give him a try.  
16      If you want to dismiss it, that's okay. I just can't  
17      argue with people, and I don't like them being profane,  
18      and making allegations.

19             THE COURT:     Tell me what allegations, and  
20      what profanity he used.

21             MS. SHAVERS:     He was very profane about you  
22      and me, and how you could not do these things to him, and  
23      you can't make him do what you had ordered him to do, and  
24      so I left. If he's changed his mind in the intervening  
25      months since I saw him last, I hope that he agrees with

1       it. But it's a difficult enough job without people  
2       making allegations about things they don't know much  
3       about.

4               THE COURT:     I agree, you don't need to put up  
5       with that.

6               MR. SCOWCROFT:     Your Honor, that's just not  
7       his position. I wasn't there. I'm not disputing what  
8       Ms. Shavers says. That's not his position. He will  
9       comply with the terms of probation. I've had a lot of  
10      contact with Mr. Ruesga over the last few months, and  
11      I've personally found him to be, after an initial  
12      difficulty in communication, quite easy to work with.  
13      And Ms. Fletcher with Pre-trial Services told me the same  
14      thing. So I really think that the fact that he's in  
15      jail, he had reasons to be upset. That simply is not his  
16      position that he will not comply with probation. He  
17      understands that the court has a great deal of power over  
18      him no matter where he goes.

19              THE COURT:     Not in Mexico.

20              MR. SCOWCROFT:     He does have family here.  
21      His son lives here, and he does have local ties. It's  
22      not his intention to just leave Utah, Your Honor. He  
23      just wants to go to Mexico to see his parents.

24              THE COURT:     I'm not going to let him go to  
25      Mexico to see his parents while he's on probation. Do

1       you understand that, Mr. Ruesga?

2               MR. RUESGA:     Yes, Your Honor.

3               THE COURT:     Mr. Ruesga, you've got a serious

4       attitude problem. We're going to set this matter for a

5       hearing. Will the only witness be Ms. Shavers?

6               MR. BOWN:     There is an additional witness,

7       but I think we could put it on with Ms. Shavers.

8               MS. SHAVERS:   My partner, Mr. Ferner, was

9       there also.

10              THE COURT:     Let's have a couple of people.

11       I can't imagine this would take any more an hour. Give

12       me an hour. June 2nd, nine o'clock.

13              MR. SCOWCROFT:   That's a little bit difficult

14       for me, just because it's my day in Circuit Court. I

15       have a number of hearings starting at nine. I could do

16       it if the Court wants to. I'll just have a conflict in

17       scheduling.

18              THE COURT:     Well, let's do it on the 2nd, if

19       that's acceptable to the State.

20              MR. BOWN:     It is.

21              THE COURT:     June 2nd. Hearing on the

22       outstanding allegations of the order to show cause. See

23       you hear then.

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REPORTER'S CERTIFICATE

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

I, BUNNY CAROL NEUENSCHWANDER, do hereby  
certify:

That I am a Certified Shorthand Reporter,  
License No. 152, and one of the official court reporters  
of the State of Utah; that on the 18th day of May, 1992,  
I attended the within matter and reported in shorthand  
the proceedings had thereat; that later I caused my said  
shorthand notes to be transcribed into typewriting, and  
the foregoing pages, numbered from 3 to 8, inclusive,  
constitute a full, true and correct account of the same  
to the best of my ability.

Dated at Salt Lake City, Utah, this 26th day of  
July, 1992.

  
BUNNY CAROL NEUENSCHWANDER, CSR, RPR

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IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

\* \* \*

THE STATE OF UTAH,	)	
	)	Case No. 911901842
Plaintiff,	)	
	)	Judge Timothy R. Hanson
vs.	)	
	)	
FERNANDO RUESGA,	)	
	)	
Defendant.	)	
<hr/>		

BE IT REMEMBERED that the above-entitled case came on regularly for hearing before the Honorable Timothy R. Hanson, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake City, Salt Lake County, State of Utah on the 2nd day of June, 1992, at 9:00 a.m., and that the following proceedings were had.

\* \* \*

A P P E A R A N C E S

FOR THE PLAINTIFF:

Walter Ellett  
Deputy County Attorney  
231 East 400 South  
Suite 300  
Salt Lake City, Utah 84111

FOR THE DEFENDANT:

Roger K. Scowcroft  
SALT LAKE LEGAL DEFENDER  
ASSOCIATION  
424 East 500 South  
Suite 300  
Salt Lake City, Utah 84111

1 P R O C E E D I N G S

2 June 2, 1992

3 THE COURT: Good morning, ladies and  
4 gentlemen. We're in session in the matter styled state  
5 of Utah versus Fernando Ruesga 911901842. The record  
6 will show the defendant is present. Counsel for the  
7 defendant is present as well as counsel for the State.  
8 This is the time set for hearing on the court's order to  
9 show cause issued at the request of Adult Probation and  
10 Parole regarding the failure of the defendant to enter  
11 into a probation agreement with Adult Probation and  
12 Parole. State ready to proceed?

13 MR. ELLETT: We are, Your Honor.

14 THE COURT: You may.

15 MR. ELLETT: I'd call Lisa Shavers to the  
16 stand.

17 MR. SCOWCROFT: Your Honor, Mr. Ruesga just  
18 asked me to state to the court that he feels he needs an  
19 interpreter who would interpret English to Spanish for  
20 his benefit.

21 THE COURT: Too late. Proceed.

22 MR. ELLETT: Thank you. Come forward, Ms.  
23 Shavers.

24 LISA SHAVERS

25 Having been called as a witness in behalf of the



1 Plaintiff, was sworn and testified as follows:

2 DIRECT EXAMINATION

3 By Mr. Ellett:

4 Q. Please state your name and spell the last  
5 name for the record.

6 A. Lisa Shavers. S-H-A-V-E-R-S.

7 Q. By whom are you employed?

8 A. State of Utah, Department of Corrections.

9 Q. In what capacity?

10 A. As a probation officer.

11 Q. How long have you been employed as a  
12 probation officer?

13 A. Since 1984.

14 Q. During that period of time, would you give me  
15 a rough estimate of the number of probationers that you  
16 have supervised?

17 A. Several thousand.

18 Q. Were you assigned to interview the defendant  
19 in this case, Mr. Ruesga, in connection with his  
20 probation that was granted by this court?

21 A. Yes.

22 Q. And did you contact him?

23 A. Yes.

24 Q. And where did that contact take place?

25 A. In the Salt Lake County Jail in the hallway

1 outside of section seven.

2 Q. And on what day?

3 A. April 16th.

4 Q. And at that time, were you accompanied by any  
5 other person?

6 A. Yes. James Ferner.

7 Q. Is he with the Department of Corrections  
8 also?

9 A. Yes.

10 Q. Did you have an occasion to sit down with the  
11 defendant, and review with him the probation that had  
12 been granted by the court?

13 A. I was standing; he was sitting, yes. We gave  
14 him a copy of his probation agreement, which had been  
15 filled out by me, and then started explaining all of the  
16 general conditions.

17 Q. Such general conditions, what were the  
18 general conditions you explained to him?

19 A. That he has to report monthly between the  
20 first and the fifth. That he has to give us a correct  
21 address and let us know before he moves, not leaving the  
22 State of Utah without written permission, those kinds of  
23 things.

24 Q. Did you also discuss with him the specifics  
25 that were imposed by Judge Hanson?

1           A.       Yes.

2           Q.       And at that point in time, did he respond to  
3 your discussion with him?

4           A.       Yes.

5           Q.       What was the response that you received from  
6 him?

7           A.       He was extremely argumentative. He said he  
8 was not -- he was not going to comply. He said that the  
9 figure that I had for the fine of 1,875 was incorrect;  
10 that what I had written down here was not what happened  
11 in court, that -- he just became extremely profane, and  
12 argumentative, and got more and more so.

13          Q.       Would you tell us please, just exactly what  
14 he said to you?

15          A.       He said fuck the Judge, fuck this shit, I'm  
16 not going to do it. You can't make me do it. There was  
17 another probationer sitting next to him who he told that  
18 that man also didn't have to do what we were asking, that  
19 I couldn't make him do it, and that the Judge hadn't said  
20 what I was telling him to do.

21          Q.       Did there appear to you to be any indication  
22 that he did not understand your conversation with him?

23          A.       No.

24          Q.       Did he appear -- did it appear to you that he  
25 didn't understand the document that you had handed him?

1           A.       No.

2           Q.       Is there anything to indicate that there was  
3           anything about the document other than his -- the fact he  
4           apparently, as he stated to you, didn't like the contents  
5           of it that would lead you to believe he didn't understand  
6           the purpose of your visit with him?

7           A.       No.

8           Q.       Based upon your experience as a probation  
9           officer, did you at that time formulate an opinion as to  
10          whether or not this defendant could be supervised as a  
11          probationer?

12                 MR. SCOWCROFT:     Objection.

13                 THE COURT:        On what basis?

14                 MR. SCOWCROFT:     Calls for speculation.

15                 THE COURT:        Overruled.

16                 MR. SCOWCROFT:     I don't see any foundation  
17          for that kind of an opinion.

18                 THE COURT:        Overruled.

19                 MR. SCOWCROFT:     Based on the length of the  
20          acquaintance, and the fact that Mr. Ruesga had not been  
21          supervised by the department at that time. So I don't  
22          think she has the knowledge to testify -- to answer that  
23          question.

24                 THE COURT:        It's overruled. It's clearly  
25          foundational.

1 Q. (By Mr. Ellett) You can answer.

2 A. In my opinion, it would be most likely he  
3 would not be easily supervised. He had stated he was  
4 going to go to Mexico, he was not going to do anything  
5 that I had requested, and he would not even calm down  
6 enough to enter into a discussion about the problems that  
7 he saw. He just continued to argue and state that he  
8 didn't have to do what either Judge Hanson or I was  
9 asking him to do, and he wasn't going to do it.

10 Q. At the conclusion of that, did you indicate  
11 to him what your recourse would be if he did not sign the  
12 document?

13 A. I told him that he would have a hearing  
14 before the Judge, and have an opportunity to explain to  
15 the Judge his side of things.

16 Q. Did he make any comment, or response to that  
17 statement?

18 A. I don't recall.

19 MR. ELLETT: All right. Thank you. That's  
20 all I have of this witness.

21 THE COURT: Cross examination, Mr. Scowcroft?

22 CROSS EXAMINATION

23 By Mr. Scowcroft:

24 Q. Ms. Shavers, Mr. Ruesga told you that the  
25 conditions you were explaining to him had not been

1 ordered by the Judge; isn't that correct?

2 A. That's correct.

3 Q. And that's why he didn't have to do them;  
4 right?

5 A. That's correct.

6 MR. SCOWCROFT: I have no further questions.

7 THE COURT: Thank you, Ms. Shavers, you may  
8 stand down.

9 THE COURT: Mr. Ellett?

10 MR. ELLETT: That's all we have, Your Honor.  
11 I think the testimony of Jim would just be repetitive.  
12 We rest on this evidence.

13 THE COURT: Defendant intend to call any  
14 witness?

15 MR. SCOWCROFT: Your Honor, I'd call Mr.  
16 Ruesga to the stand.

17 THE COURT: Mr. Ruesga come forward.

18 MR. SCOWCROFT: He would like to read a  
19 statement.

20 THE COURT: He can do that without being  
21 unshackled. Come up here, Mr. Ruesga.

22 FERNANDO RUESGA

23 Having been called as a witness in behalf of the  
24 defendant, was sworn and testified as follows:

25 DIRECT EXAMINATION

1 By Mr. Scowcroft:

2 Q. What is your name, Mr. Ruesga?

3 A. Fernando Ruesga.

4 Q. Is there anything you'd like to say to the  
5 Judge?

6 A. Yes, that I did mention this, you know -- can  
7 I read this paper?

8 THE COURT: Do anything you want.

9 A. Judge Hanson, I am writing in behalf of my  
10 probation agreement. It's in my best interest to bring  
11 to the court's attention my lack of understanding of  
12 English, which has caused me to be misunderstood about  
13 the agreement. The court should know that I never  
14 intentionally wanted to indicate or express any desire to  
15 not keep my part by not signing the probation agreement.  
16 I'll make it clear to the court that I have spoken with  
17 people in jail, and found out what a probation agreement  
18 was, and I will sign it, and cooperate with my probation  
19 to the fullest extent. When I told the PO, probation  
20 officer, that I want to go to Mexico, I mean after I took  
21 care of all my troubles, and did not mean running away  
22 from them. I will not leave until I have finished here  
23 my probation. My children and grandchildren live here in  
24 Salt Lake City. The time I got put into custody on April  
25 6th, my lawyer said he would talk to me, but he never

1 did. I also told him that I didn't understand English  
2 very well. Yet -- so when the probation officer came, I  
3 was confused. I need an interpreter to make it  
4 understood.

5 Q. Mr. Ruesga, now, you said that when you were  
6 in court on April 6th?

7 A. Yes.

8 Q. For sentencing in this case?

9 A. Yes.

10 Q. You agreed at that time to sign a probation  
11 agreement?

12 A. I never said anything. I plead guilty to the  
13 charge, but, you know, I never said anything, you know,  
14 like you were supposed to talk to me even before I got  
15 sentenced. My counselor, Ginger, told me that you were  
16 supposed to talk to me.

17 Q. Ginger Fletcher?

18 A. Ginger, my counselor. So you never did, and  
19 after I got sentenced, you told me you was to talk to me,  
20 and you never did either, so I was confused.

21 Q. Now, are you willing to do what the court  
22 orders you to do in this probation?

23 A. Yes. See, I know nothing about -- I never  
24 been on probation.

25 Q. And you understand that you're required to do



1       what your probation officer tells you?

2           A.       Yes.

3           Q.       And that if you don't do that, it's a  
4       violation of your probation?

5           A.       Yes.

6           Q.       And you can be sent to prison. Do you  
7       understand that?

8           A.       Yes.

9           Q.       And are you willing to comply with the  
10       court's ordered probation?

11          A.       Yes.

12               MR. SCOWCROFT:     I have no further questions.  
13       Your Honor, I'd ask that the letter that I submitted to  
14       the court -- I've given a copy to the State's  
15       representative -- be admitted into the record for the  
16       purposes of this hearing. It's a letter from Ginger  
17       Fletcher who supervised Mr. Ruesga at Pre-trial Services  
18       during the pendency of these proceedings prior to the  
19       sentencing.

20               THE COURT:       Do you want to mark it as an  
21       exhibit?

22               MR. SCOWCROFT:     Your Honor, I'd ask that this  
23       be admitted, Your Honor, and I would further ask that the  
24       letter that Mr. Ruesga has addressed to you, Your Honor,  
25       be marked, and admitted also into the record. It is

1 exactly what Mr. Ruesga just read.

2 THE COURT: Any objection to Exhibit 1?

3 MR. ELLETT: Well, Your Honor, I think that  
4 foundationally I would have one. In order for the court  
5 would have all the information that would be available to  
6 benefit the defendant, I have no objection.

7 THE COURT: One and two are received. You  
8 may cross examine.

9 MR. ELLETT: Thank you.

10 CROSS EXAMINATION

11 By Mr. Ellett:

12 Q. Sir, what was the difficulty that you had  
13 with Ms. Shavers when she talked to you in the jail that  
14 -- by which you indicated you weren't going to sign the  
15 probation agreement?

16 A. I did say apparently a few words. I was not  
17 aware of what I was really doing, because, see, I didn't  
18 know what probation was or anything. My lawyer was  
19 supposed to talk to me, and never did, before or after,  
20 and so I didn't know nothing about it.

21 Q. Well, did you tell Ms. Shavers that you  
22 wanted to talk to your attorney first?

23 A. I didn't even think about it, sir.

24 Q. As a matter of fact, you told her that you  
25 didn't have to do anything the Judge told you, didn't

1       you?

2           A.       No, I did not say that.

3           Q.       What did you say to her?

4           A.       I did say that I would rather do all the  
5 time, and just get out of there without probation.

6           Q.       Get out without probation?

7           A.       Yes. Just do all my time.

8           Q.       Do all your time without probation, and then  
9 go to Mexico?

10          A.       Yes. That's what I meant to say. That's  
11 what -- that was my intention. I don't know how she  
12 understood, or what, but that was my --

13          Q.       Are you telling me you thought you could just  
14 serve six months in jail, and then go to Mexico?

15          A.       No, sir. Eighteen months, which she was my  
16 probation --

17          Q.       You understood that the Judge had ordered you  
18 to pay a fine?

19          A.       Yes.

20          Q.       Did you tell her that you weren't going to  
21 pay a fine?

22          A.       Well, I didn't say that. I just said, you  
23 know, I'll do my time.

24               MR. ELLETT:    I understand. That's all, Your  
25 Honor.

1 THE COURT: Let me see Exhibit 2. Anything  
2 further on redirect, Mr. Scowcroft?

3 MR. SCOWCROFT: No, Your Honor. If I could  
4 just -- can I approach the witness?

5 THE COURT: If you have a question --

6 MR. SCOWCROFT: Thank you. I have nothing  
7 further, Your Honor.

8 EXAMINATION

9 By The Court:

10 Q. Mr. Ruesga, do you see Exhibit 2 here, this  
11 thing you read to me?

12 A. Yes. Your Honor.

13 Q. Exhibit 2, the one you just read to me?

14 A. Yes, Your Honor.

15 Q. Did you write that?

16 A. Yes, Your Honor. Somebody helped me place  
17 the words that I meant to say.

18 Q. It's in your hand? You wrote it down?

19 A. Yes.

20 Q. Did you write with a pencil?

21 A. Yes. I wrote it out.

22 THE COURT: Thank you, sir, you may stand  
23 down.

24 MR. RUESGA: Thank you.

25 THE COURT: Further evidence, Mr. Scowcroft?

1 MR. SCOWCROFT: None. We rest, Your Honor.  
2 THE COURT: Anything further from the State?  
3 MR. ELLETT: No.  
4 THE COURT: Anything on closing?  
5 MR. ELLETT: Well, Your Honor, only to the  
6 effect I'm not sure that this defendant really is as  
7 lacking in the ability to understand the English language  
8 as he would want the court to believe, and I think that  
9 when Ms. Shavers went down there and told him what the  
10 restrictions were, that just exactly what he said to her  
11 is just exactly what he meant. That is you can't tell  
12 him what to do, she can't tell him what to do, and that  
13 he'S going to Mexico. I have to believe Ms. Shavers,  
14 based on her experience, certainly can determine from the  
15 attitude from the first visit whether the man can be  
16 easily supervised. I don't think this man can be. It  
17 would be our recommendation, and the recommendation  
18 originally with the presentence report, that he be sent  
19 to the Utah State Prison, do his time, and then he can go  
20 to Mexico.  
21 THE COURT: Thank you. Mr. Scowcroft?  
22 MR. SCOWCROFT: Your Honor, on April 6th when  
23 Mr. Ruesga was sentenced, he stated at that time he was  
24 willing to comply with the conditions the court imposed  
25 in probation. He has stated that again today, June 2nd.

1 He also stated that on May 18th of 1992. In terms -- and  
2 so that is his position, and, you know, we ask the court  
3 to allow him to do that. I've submitted a couple pieces  
4 of evidence. The letter from Ms. Fletcher, Your Honor,  
5 is a -- says some very nice things about Mr. Ruesga. Mr.  
6 Ruesga was an excellent client. He did everything he was  
7 told. He submitted to numerous urinalysis, none of which  
8 came up positive. He was always neatly dressed, and they  
9 considered him very cooperative.

10 Now, I worked with Mr. Ruesga for several months. I  
11 think it should be obvious to the court, it seems to me  
12 anyway, that Mr. Ruesga, he has a heavy accent. I do  
13 believe that he has some difficulty understanding what  
14 he's supposed to do here. And Ms. Shavers did state that  
15 Mr. Ruesga said he would not comply with things the court  
16 had not ordered in his understanding. And so I think  
17 what occurred here was a very unfortunate  
18 misunderstanding on Mr. Ruesga's part that I think should  
19 be outweighed by his prior performance to Pre-trial  
20 Services.

21 I've personally found him to be quite an agreeable  
22 and cooperative person to work with after an initial  
23 period where even I had trouble communicating with him  
24 when I met with him in my office. So I think he has  
25 stated over and over again that he will comply. I

1 believe that he will. He has his brother here. His son  
2 is here. His grandchildren are here in Salt Lake. The  
3 stuff about Mexico, he has two elderly parents in Mexico,  
4 Judge, and he was allowed to go to Mexico to see them by  
5 Pre-trial Services, and he came right back. So I think  
6 that's what he meant. He's concerned about their health.  
7 They are elderly and in poor health. All he meant was he  
8 wants to see them while they are still alive.

9 And I think that he will comply, Judge, and I think  
10 that this violation, as I said, I don't mean to justify  
11 what he did, but I think he ought to be given a chance at  
12 least to demonstrate to the court that he will comply.  
13 And this conduct I think resulted from his  
14 misunderstanding of what he is supposed to do.

15 Also, I really believe that if we can, as a State,  
16 it's better to put people on probation if they will  
17 succeed. It's a very expensive thing to incarcerate  
18 someone in the Utah State Prison. This court saw fit not  
19 to do that, and I still think that that's the appropriate  
20 way to go here. I think Mr. Ruesga's -- some of the  
21 things we've shown you, Judge, indicate that he will be a  
22 successful probationer, and I'd ask you to just simply  
23 give him that chance. Let him serve out his six months  
24 in the jail. He's been there less than a month. Give  
25 him an opportunity to do that.

1 I think that based on the way he performed to  
2 Pre-trial Services, it's a good bet that he'll do well  
3 with AP&P.

4 THE COURT: Thank you. Anything further  
5 from the State?

6 MR. ELLETT: No, Your Honor, we'd submit it.

7 THE COURT: Are you telling me, Mr.  
8 Scowcroft, that with regard to your client's  
9 understanding that it's now your position that he doesn't  
10 understand the English language well enough to proceed in  
11 these proceedings?

12 MR. SCOWCROFT: I'm not saying that, Judge.  
13 We've not had an interpreter during these proceedings.  
14 There have been a number of appearances we've made in  
15 court, and I've spoken with Mr. Ruesga on a number of  
16 occasions. Do I think, though, that there is a  
17 significant -- well, I shouldn't say -- I think his  
18 command of the English language is somewhat marginal, and  
19 I think his heavy accent is evidence of that. That's all  
20 I could say really in that regard.

21 THE COURT: Well, I'm glad to hear you're not  
22 taking that position now. With regard to the order to  
23 show cause with which we're concerned here today, that is  
24 the allegation that the defendant has refused,  
25 intentionally and knowingly refused, I suppose I read



1       that into it, to sign the probation agreement as is  
2       customarily required, and part of this court's  
3       requirement for probation supervision, the court is  
4       satisfied that there has in fact been a violation of the  
5       terms and conditions of probation by the defendant  
6       initially, and that is based upon his refusal to even  
7       start the probation process by refusing in no uncertain  
8       terms at the request of Ms. Shavers to sign the probation  
9       agreement once it had been explained to him.

10               With regard to the dispute in testimony regarding  
11       what may have occurred, and what may not have occurred at  
12       the county jail when Ms. Shavers attempted to explain --  
13       not attempted to, she did explain, and the defendant  
14       refused to agree to the terms of probation, I find that  
15       Ms. Shavers' testimony is believable. I find the  
16       defendant's is not.

17               I find the occurrences were as Ms. Shavers suggested  
18       to me were, and testified to. To the extent that the  
19       defendant's testimony is contrary, I do not believe it. I  
20       don't find it credible. Of particular importance I think  
21       is the defendant's attitude suggesting to Ms. Shavers,  
22       that he could do as he chose. His choice of language is  
23       not only inappropriate, but suggestive of his refusal to  
24       cooperate, and sign the agreement. So accordingly, I'm  
25       satisfied that he has knowingly and intelligently, and

1 with purpose refused to cooperate with Adult Probation  
2 and Parole and sign the probation agreement.

3 I think that's further enhanced by what has occurred  
4 since that was brought to my attention. One would assume  
5 if there is a misunderstanding as alleged by the  
6 defendant, that I found did not occur, but he understood  
7 what was happening, but even if that was believable,  
8 which it is not, certainly when he found out what was  
9 going to happen, one would expect him to immediately do  
10 what was necessary to remedy the situation for his first  
11 appearance in court. The record will speak for itself.  
12 But his first appearance in court, according to my  
13 recollection, was further attempts to argue and explain  
14 why he didn't have to do the things he was supposed to.

15 There was a clear opportunity to sign it, and he has  
16 refused. Therefore, I find he's violated the terms and  
17 conditions of his probation before this court by failing  
18 to agree to the terms and conditions of probation. And  
19 inasmuch as probation is a privilege and not a right, the  
20 defendant could choose not to be on probation if he  
21 likes, and he has made that choice.

22 Finally, I'm satisfied on that same subject, that  
23 because probation is a privilege, because resources are  
24 limited in that regard, and because persons like Ms.  
25 Shavers who deal with defendants who are being supervised

1 on probation, it's not part of their job description to  
2 take abuse from defendants, and certainly not the type of  
3 abuse that's been described here. That in and of itself  
4 is a violation of probation. She doesn't have to put up  
5 with that. And I intend to see that she doesn't to the  
6 extent that I have the ability to do that.

7 Therefore, I find that defendant has in fact  
8 violated the terms and conditions of his probation. With  
9 regard to the suggestion of the defendant both in Exhibit  
10 2, and as stated on the record, at least made reference  
11 to by Mr. Scowcroft, the defendant doesn't have command  
12 of the English language sufficient to allow him to  
13 understand what's going on, I find that statement --  
14 while I'm satisfied he doesn't have the command of the  
15 English language that others may, it is sufficient so  
16 that he understands what happens here in the court.  
17 There has never been a suggestion until this hearing that  
18 he had difficulty with understanding or communicating the  
19 English language. He appeared in this court, he  
20 understood the Boykin process, he reviewed the affidavit.  
21 He has handwritten Exhibit 2, and signed it. He read it.  
22 The court is satisfied that his suggestion that he may be  
23 somewhat impaired, or misunderstood things because of his  
24 lack of understanding of the English language is without  
25 merit, and I reject it. I think he does have an

1       understanding, and did at the time.

2               All right. Is there any reason I ought not to  
3       impose the original sentence, and send Mr. Ruesga to  
4       prison?

5               MR. ELLETT:       Not as far as we're concerned,  
6       Your Honor.

7               MR. SCOWCROFT:    Well, I think there is,  
8       Judge. Every time he's appeared in court since the  
9       sentencing, the prior hearing on the 18th of May of this  
10      year, today, he stated that he would sign the agreement,  
11      and that he would comply.

12              THE COURT:       Not true, Mr. Scowcroft. He may  
13      have said it as he was going out the door, but he wanted  
14      to argue with me the first time he was here. I'm not  
15      going to argue with people about probation. If they  
16      don't want to be on probation, I don't care.

17              MR. SCOWCROFT:    I really do. Our position at  
18      the last hearing was that we simply asked the court to  
19      allow him to be on probation, and that he would sign. We  
20      asked the court at that time to dismiss the allegation,  
21      allow him to serve out his time, and be on probation  
22      based on his willingness to sign. So my recollection,  
23      Judge, is that every time he's appeared in court, these  
24      three hearings, he has offered to sign the agreement, and  
25      he does today.

1 THE COURT: Sobeit. But in any event, I  
2 found him in violation of probation. Tell me why I  
3 shouldn't send him to prison.

4 MR. SCOWCROFT: Your Honor, I think for the  
5 same reasons that you didn't on April 6th. It is a  
6 relatively minor drug offense. Mr. Ruesga's criminal  
7 history, which you asked me to research and submit,  
8 indicated to you -- does not warrant his incarceration in  
9 the prison. Further, his performance over a period of  
10 about six months with Pre-trial Services suggests that he  
11 will report, he will comply, and that -- I think that's  
12 born out in Defendant's Exhibit 1 that was submitted here  
13 today. And this was a possession of a small amount of  
14 cocaine. He told -- it was found in a home, his son's  
15 home. He told the police it was his when they arrived  
16 there with a warrant. And I mean, he's been completely  
17 forthcoming about it all the time, so I don't see him as  
18 someone who's attempting to deceive the court, someone  
19 who's trying to avoid the consequences of his conduct,  
20 and what's occurred. And I think he ought -- I think he  
21 ought to be given a chance. I mean had he committed  
22 another offense, had he failed to report, those are  
23 evidence of someone being unsuperviseable, but I just  
24 don't think that's the situation.

25 And so I think when someone will succeed on

1 probation, I think the State's interests are better  
2 served than simply putting him in prison at great cost  
3 based on the nature of this offense, and also the fact  
4 that there's some evidence suggesting that he will  
5 succeed. And he'll be paying rather than the taxpayers  
6 be paying for all this, by paying his fine, paying the  
7 restitution, and doing what he's supposed to do. And  
8 that's a better outcome if he does it.

9 THE COURT: Thank you. Anything further from  
10 the State?

11 MR. ELLETT: Well, Your Honor, I would like  
12 to just respond to that statement. I don't know what the  
13 conviction circumstances are, but I know this man has a  
14 long arrest history dating back to 1972, which indicates  
15 to me that he's well acquainted with the system, that  
16 when he left this court with the understanding that  
17 probation had been granted to him, even in light of the  
18 fact that we had recommended prison initially, that he  
19 understood that that would require some restrictions.  
20 And even though he was a good candidate on pre-trial  
21 release, they didn't have the restrictions that were  
22 placed upon him that probation placed upon him. And I  
23 think when Ms. Shavers gave him those restrictions, he  
24 just let her have it. And now the court understands what  
25 his true feelings are, and that is he'll do what he

1       wants.

2               And I think based upon that, Your Honor, we just  
3       have a situation where he did the crime, he must do the  
4       time. And if he wants to go to Mexico, we have no  
5       objection. But I think that he should be committed.

6               THE COURT:       Thank you. Submit the matter?  
7       Well, as Mr. Ellett properly points out, not only was the  
8       original recommendation, but even after an in-depth  
9       review of the prior involvement in the criminal justice  
10      system that was listed in the presentence report, the  
11      recommendation was still the same for a number reasons,  
12      and the record will speak for itself. I deviated from  
13      that because I thought that perhaps Mr. Ruesga was  
14      someone that was entitled to show me that he could comply  
15      with the requirements for probation, and perhaps this  
16      would be the last time we'd see him in the system. That  
17      turned out not to be true. As a matter of fact, he  
18      didn't even get started.

19              I don't intend to waste the valuable resources of  
20      Adult Probation and Parole Department, and good people  
21      that work in it to deal with somebody who chooses not to  
22      even so much as start the probation process. I recognize  
23      that it's expensive to put people in the Utah State  
24      Prison, and the dollars cannot drive this court's  
25      decision, but in the final analysis, for whatever it's

1     worth, the cost of incarcerating Mr. Ruesga for dealing  
2     -- for possessing cocaine pales in comparison to the cost  
3     to this community of the illegal use of drugs. The  
4     answer is certainly lock people up who certainly refuse  
5     to even take the first step towards probation.

6             Mr. Ruesga, you are not an appropriate candidate for  
7     probation. The prior sentence of zero to five years in  
8     the Utah State Prison and the fine are reinstated.  
9     Commitment will be forthwith. Any statement that I made  
10    regarding probation before is terminated, and you're not  
11    entitled to probation, and you can deal with the parole  
12    board when they decide you can get out. Commitment is  
13    forthwith, and Mr. Ruesga will be entitled to credit for  
14    time served in the county jail against his period of  
15    incarceration in the Utah State Prison. Commitment is  
16    forth with. We'll be in recess.

17  
18  
19  
20  
21             \*     \*     \*



REPORTER'S CERTIFICATE

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

I, BUNNY CAROL NEUENSCHWANDER, do hereby  
certify:

That I am a Certified Shorthand Reporter,  
License No. 152, and one of the official court reporters  
of the State of Utah; that on the 2nd day of June, 1992,  
I attended the within matter and reported in shorthand  
the proceedings had thereat; that later I caused my said  
shorthand notes to be transcribed into typewriting, and  
the foregoing pages, numbered from 3 to 27, inclusive,  
constitute a full, true and correct account of the same  
to the best of my ability.

Dated at Salt Lake City, Utah, this 26th day of  
July, 1992.

  
BUNNY CAROL NEUENSCHWANDER, CSR, RPR

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IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

\* \* \*

THE STATE OF UTAH,	)	
	)	Case No. 911901842
Plaintiff,	)	
	)	Judge Timothy R. Hanson
vs.	)	
	)	
FERNANDO RUESGA,	)	
	)	
Defendant.	)	
_____	)	

BE IT REMEMBERED that the above-entitled case came on regularly for hearing before the Honorable Timothy R. Hanson, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake City, Salt Lake County, State of Utah on the 22nd day of June, 1992, at 9:00 a.m., and that the following proceedings were had.

\* \* \*

FILED DISTRICT COURT  
Third Judicial District

JUL 27 1992

ORIGINAL

SALT LAKE COUNTY  
By M. Miller  
Page Clerk

BUNNY C. NEUENSCHWANDER, CSR, RPR

720426-41

000137

A P P E A R A N C E S

FOR THE PLAINTIFF:

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FOR THE DEFENDANT:

Roger K. Scowcroft  
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ASSOCIATION  
424 East 500 South  
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Salt Lake City, Utah 84111

1 P R O C E E D I N G S

2 June 22, 1992

3 MR. SCOWCROFT: Number eight on the court's  
4 calendar, Fernando Ruesga.

5 THE COURT: State of Utah versus Fernando  
6 Ruesga, 911901842. Matter before the court is a request  
7 on the part of the defendant to stay the sentence pending  
8 appeal. I assume you're going to appeal the commitment  
9 based upon my finding that he refused to enter into a  
10 probation agreement.

11 MR. SCOWCROFT: That's correct, Your Honor.  
12 We've also filed a motion to reconsider that order.

13 MR. SCOWCROFT: Mr. Ruesga is present. Roger  
14 Scowcroft on his behalf.

15 THE COURT: All right. This is case number  
16 911901842. As I've indicated, I had a motion to stay  
17 sentence pending appeal, and Mr. Scowcroft's advised that  
18 he's filed a motion to reconsider my decision to  
19 terminate the -- actually before we even got started, the  
20 probation of Mr. Ruesga. Is the State ready?

21 MR. WARNER: We are. There's also the  
22 defendant's objections to the proposed Findings of Fact.

23 MR. SCOWCROFT: That's correct, Your Honor.  
24 I have a copy of that, if you don't have a copy in your  
25 file. It was filed with the District Court on the 5th of

1 June.

2 MR. WARNER: I have a copy as well if the  
3 court needs that. Mr. Ellett provided that, and we stand  
4 by those findings. Do you have a copy in your file, Your  
5 Honor?

6 THE COURT: I've already signed the findings.  
7 I don't think I've ever received an objection to the  
8 findings. I signed the findings on June 9th. The motion  
9 for re-consideration filed on June 10th. There's a  
10 motion to stay sentence pending appeal, and that's it.  
11 Somebody have a copy of the motion objecting to the  
12 findings?

13 MR. WARNER: I was just -- just received  
14 that.

15 MR. SCOWCROFT: If I could approach, I have a  
16 copy of that here.

17 THE COURT: Let's take up the motion to  
18 reconsider first. Why should I reconsider this?

19 MR. SCOWCROFT: All right. Your Honor --

20 MR. WARNER: Your Honor, before we get into  
21 that, I think there is a procedure ground. I think once  
22 he's been committed, I don't think the court even has  
23 jurisdiction to reconsider. I think he's been committed.  
24 Also, unless you believe -- well, I'll restate that.  
25 Unless you believe that your decision is in error,

1       legally, then I don't believe that you have any power to  
2       reconsider.

3               THE COURT:     I assume you'll address that  
4       issue as soon as Mr. Scowcroft is through.

5               MR. SCOWCROFT:     Thank you, Your Honor.  As  
6       you recall, Mr. Ruesga refused to sign a probation  
7       agreement.  That some of the testimony at the hearing  
8       that was held on June 2nd in this matter was that Mr.  
9       Ruesga, according to Ms. Shavers, refused to sign it,  
10      because he believed he had not been ordered to comply  
11      with certain conditions in the document.  Our position,  
12      Your Honor, is that refusal to sign the agreement is not  
13      itself a violation of probation.  Further, it's contrary  
14      -- it's contrary to Mr. Ruesga's testimony, that being he  
15      fully intends to comply with probation.  Also, we feel  
16      that it was not a deliberate refusal to comply with the  
17      conditions contained in the document because he testified  
18      he -- Ms. Shavers testified he did not understand, did  
19      not believe that some of those condition had been ordered  
20      by the Court.  So two things.  We think in itself it's  
21      not a violation.  Number two, it does not evidence Mr.  
22      Ruesga's deliberate refusal to comply with probation.  
23      That's why we filed an objection to the State's proposed  
24      finding number five.  And that's contained in defendant's  
25      objections and proposed amendments to State's proposed

1 findings of probation violation and commitment. That's  
2 why we'd reconsider, Your Honor. We'd ask you to rescind  
3 an order finding a violation of probation based on the  
4 testimony that was made here on June 2nd.

5 THE COURT: What say the State?

6 MR. WARNER: State just simply disagrees.  
7 That's always a condition of any probation. Otherwise,  
8 if a person -- if a person weren't required to enter into  
9 an agreement, and he violated the agreement, he'd say,  
10 gee, I didn't know about that, I didn't know that.  
11 They'd think that wasn't a part. I don't know how we'd  
12 ever prove a probation violation. I think pretty clearly  
13 condition of probation that you agree to be on probation,  
14 agreeing to be on probation signing the agreement. I  
15 think the court was correct in its analysis, and we'll  
16 submit it on the hearing, and ask that that be denied.

17 THE COURT: Mr. Scowcroft, what do you say  
18 about my lack of jurisdiction in this matter as suggested  
19 by the State?

20 MR. SCOWCROFT: I think that the Court,  
21 according to the Rules of Criminal Procedure, always has  
22 jurisdiction to correct a "illegal sentence", and our  
23 position is that he just didn't violate probation  
24 technically. And that he's testified that he would  
25 comply with probation. In fact, I think he testified

1 he'd sign the agreement when we were here on June 2nd. I  
2 think the court has jurisdiction for the purposes of this  
3 hearing. I have my code book here. I could probably  
4 find that code section if you'd like.

5 MR. WARNER: If the court feels like it's  
6 made a legal error, I agree you could correct that  
7 sentence. That would be the purpose of appeal. If you  
8 don't feel that you've made any legal errors, and say you  
9 just want to give the defendant another chance,  
10 reconsider from the standpoint of, gee, if I'd -- I would  
11 have violated him, but reinstated it through the goodness  
12 of my heart, I don't think you have the authority to do  
13 that now. I think the only thing you can correct is  
14 legal sentence if you feel you're in error legally. If  
15 you've had a change of heart because the defendant were  
16 repentent or whatever, I think you've lost jurisdiction.

17 THE COURT: You don't disagree with that, Mr.  
18 Scowcroft?

19 MR. SCOWCROFT: I've not researched that, but  
20 -- so I'm not in a position to disagree with it right  
21 now.

22 THE COURT: Well, with regard to the motion  
23 to reconsider, that motion is denied. I am satisfied the  
24 decision was appropriate both on the facts and the law  
25 initially. I see no reason to change it. Mr. Ruesga had



1 plenty of opportunity to enter into a probation  
2 agreement. He said what he said to Ms. Shavers, and I  
3 believe her account of the facts as opposed to his. With  
4 regard to the findings the State submitted, I'm satisfied  
5 that they were appropriate. I specifically found that  
6 while Mr. Ruesga had a limited understanding of English,  
7 he understood what was going on, and that's born out by  
8 the record. And I'm also satisfied that refusal to sign  
9 the probation agreement in the manner in which it was  
10 accomplished here as suggested by Ms. Shavers does in  
11 fact constitute a violation of probation. So I'm not  
12 satisfied that there's either an error in fact or law.  
13 The motion to reconsider is denied. The motion -- the  
14 objection to the proposed findings is overruled, and will  
15 stand as signed. What about the stay?

16 MR. SCOWCROFT: Your Honor, I think Rule 27  
17 of the Rules of Criminal Procedure gives a trial court  
18 discretion to stay a sentence pending appeal. I think  
19 were the court interested in granting that motion, the  
20 sentence in its entirety would be stayed, and so I think  
21 it's a discretionary motion made to this court. The  
22 standards in the rule are that the issues raised by the  
23 defendant are meritorious, and should be decided by an  
24 appellate court. We're required procedurally to raise  
25 that issue with the trial court if we're ever to raise it

1 again with a Court of Appeals. They also have  
2 jurisdiction to look at it if it's denied by a trial  
3 court. Again, I think it's a purely discretionary matter  
4 with the Court. But we would ask the court to consider  
5 it.

6 THE COURT: Anything from the State?

7 MR. WARNER: Again, I think the Court has the  
8 authority to do it, but under State versus Neeley I don't  
9 believe that the defendant has met its burden of proof  
10 and entitled to a stay pending appeal. I don't think  
11 it's a novel, or meritorious issue. I think it's pretty  
12 clear-cut, and I don't think it's novel.

13 THE COURT: Anything further, Mr. Scowcroft?

14 MR. SCOWCROFT: Nothing further.

15 THE COURT: Motion to stay is denied as well.  
16 I'm satisfied the defendant hasn't shown there's anything  
17 unusual about this. He merely doesn't like my findings.  
18 He can tell that to the Court of Appeals. We'll give the  
19 Court of Appeals a chance to give you a stay.

20 THE COURT: Motion denied. State prepare an  
21 order on all three matters.

22 MR. WARNER: Yes, Your Honor.

23 MR. SCOWCROFT: I didn't hear that.

24 THE COURT: I asked the State to prepare an  
25 order on all three motions.

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REPORTER'S CERTIFICATE

STATE OF UTAH )  
 ) ss.  
COUNTY OF SALT LAKE )

I, BUNNY CAROL NEUENSCHWANDER, do hereby  
certify:

That I am a Certified Shorthand Reporter,  
License No. 152, and one of the official court reporters  
of the State of Utah; that on the 22nd day of June, 1992,  
I attended the within matter and reported in shorthand  
the proceedings had thereat; that later I caused my said  
shorthand notes to be transcribed into typewriting, and  
the foregoing pages, numbered from 3 to 9, inclusive,  
constitute a full, true and correct account of the same  
to the best of my ability.

Dated at Salt Lake City, Utah, this 26th day of  
July, 1992.

  
BUNNY CAROL NEUENSCHWANDER, CSR, RPR